

GAN CHAI GIOK

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v.

DAUD BIN ANGGAU & ANOR.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[SUIT NO. K 111 OF 1992]
28 OCTOBER 1995

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TORT: *Fatal accident - Dependency claim - Civil Law Act 1956, s. 7 - Liability admitted - Quantum of general damages - Whether damages proved - Living expenses of deceased considered - Whether "living expenses" in s. 7(3)(iv)(c) and s. 28A(2)(c)(iii) have same meaning.*

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The plaintiff, who was the widow of the deceased brought an action under s. 7 of the Civil Law Act 1956 (the Act) on behalf of herself and her two children for loss of dependency arising from a fatal accident wherein liability had been wholly admitted by the defendants. Special damages had been agreed upon and the only issue before the Court was as to the quantum of general damages to be awarded for loss of dependency.

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From the evidence of the administration and finance manager (PW1) of Rimyasa Development Sdn. Bhd. (Rimyasa) it was learned that the deceased worked as a subcontractor for Rimyasa producing sawn timber and was paid monthly wages of between RM65,000 and RM95,000. Payment vouchers signed by PW1 were introduced into evidence. PW1 also stated that the deceased stayed in the free quarters provided by Rimyasa. PW1's testimony was corroborated by the cashier (PW2) who prepared the said payment vouchers and general clerk (PW4) who was also involved in the preparation of the payment vouchers at the material time. The deceased's younger brother (PW5) also confirmed that the deceased had worked for Rimyasa between 1985 and 1989 during which period he worked as the deceased's foreman but he denied that he was a partner of the deceased and shared the profits of the business. But he did take over the contract work after the death of the deceased and collected about RM80,000 a month with a nett income of RM4,000 per month. He further informed the Court that the deceased had between 70 to 80 workers and paid about RM230 per month for meals at the canteen and did not employ a maid. It was not disputed that the deceased was 41 years old at the time of death and according to the widow of the deceased (PW3) he was a healthy man. She testified that she worked in a wholesaler factory but the deceased supported the family by giving her RM1,800 per month. He also employed a maid and had a car but she could not produce any documentary evidence to support her claim.

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a Held:

- b** [1] The same language is used in both s. 7(3)(iv)(c) and s. 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. The Court is accordingly of the view that the term “living expenses” in s. 7 and s. 28A bears the same meaning.
- c** [2] From the evidence adduced the Court finds as a fact that the deceased was employed as a subcontractor with Rimyasa and accepts the testimony of PW1, PW2 and PW5 that the deceased received subcontract fees of between RM65,000 to RM95,000 per month and that PW5 was not a partner of the deceased. Their testimonies are corroborated by the documentary exhibits tendered. From the monthly subcontract fees, the Court assesses the deceased’s monthly income at RM3,000.
- d** [3] Pursuant to s. 7(3)(iv)(c) of the Act, the living expenses of the deceased is assessed at RM1,600 i.e. RM400 for food, RM200 for a maid and RM1,000 for personal expenses and necessities. In the Court’s view the deceased contributed less than RM1,800 to his widow and children, that was why she had to work to supplement her income. Therefore the loss
- e** of dependency per month is RM3,000 minus RM1,600 which equals RM1,400. The total loss of dependency is therefore RM1,400 x 84 months which equals RM117,600 with no interest, two-thirds to be apportioned to the widow and the remaining one-third to the two minor children on trust by the Public Trustee in equal shares until their maturity. Special damages
- f** are awarded as agreed with interest. Costs to the plaintiffs.

[Plaintiff's claim allowed with costs].

Cases referred to:

- g** *Chang Chong Foo v. Shivanathan* [1992] 4 CLJ 1939, [1992] 2 MLJ 473 (**fol**)
Harris v. Empress Motors Ltd.; Cole v. Crown Poultry Packers Ltd. [1983] 3 ALL ER 561 (**refd**)
White v. London Transport Executive [1982] 1 ALL ER 410 (**refd**)

Legislation referred to:

- h** Civil Law Act 1956 (Revised - 1972), ss. 7, 7(3)(iv)(c), 7(3)(iv)(d), 28A, 28A(2)(c)(iii)
Evidence Act 1950, s. 114(g)

For the plaintiff - Norbert Yapp; M/s. Jayasuriya Kah & Co.

For the defendants - Sonny Durai; M/s. Wong Yapp Chung & Co.

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JUDGMENT

Tee Ah Sing JC:

This is an action by the plaintiff, the lawful widow of Tan Tee Chang (“the deceased”) for the benefit of the dependents of the deceased under s. 7 of the Civil law Act 1956 (Revised - 1972) (“the Act”) against the defendants arising out of an accident on 4 August 1989.

Liability has been admitted at 100% by the defendants.

Special damages amounting to RM22,000 has been agreed by the defendants.

The only issue for the Court to decide is the quantum of general damages for loss of dependency.

The case for the plaintiff is as follows.

Wong Kok Kut (PW1) has stated in evidence that he was working with Rimyasa Development Sdn. Bhd. (hereinafter referred to as “Rimyasa”) from 1987 till 1991 as the administration and finance manager. The nature of Rimyasa’s business is extraction of log and saw milling. The average monthly turnover was around few million ringgit. PW1 has stated that Rimyasa employed one Tan Tee Chang (the deceased) as a subcontractor of the company. The deceased’s main duty was to produce sawn timber for Rimyasa. The deceased got paid according to the tonnage produced. On the average the deceased’s monthly subcontract wages ranges from RM65,000 to RM95,000. The deceased used Rimyasa’s machinery to produce the sawn timber. After the deceased passed away the deceased’s brother Tan Teak Ang (PW5) took over the subcontract work.

PW1 also stated that he signed the payment vouchers (P1 A21 to A32).

In cross-examination PW1 stated that the deceased stayed in Rimyasa’s quarters and he did not have to pay for the quarters.

Yong Nyuk Ho (PW2) has testified that she worked with Rimyasa since 1979 up till now. In 1981 she became a cashier in Rimyasa.

She also stated that the deceased was a sawing contractor with Rimyasa.

She said P1 A1 to A33 were the payment vouchers. She prepared the payment vouchers which bore her signature except P1 A5, P1 A6, P1 A9, P1 A11, P1 A15, P1 A16 and P1 A18.

On a monthly basis RM70,000 to RM80,000 was paid to the deceased.

Gan Chai Giok (PW3) has stated in examination-in-chief that the deceased was her late husband. And they have two children namely Tan Beng Hong who is 15 years old now and Tan Ko Lei who is 12 years old now. Before

- a* her husband passed away she was staying in Segamat, Johore with the two children. Prior to his death her husband was working in Keningau, Sabah as a subcontractor of a sawmill.

- b* PW3 also said that the deceased supported the family by giving her RM1,800 every month. Her monthly expenses were RM600 for rental, electricity and water RM150, food RM800. And expenses for each child RM150. She further testified that her husband was living at the sawmill quarters and he did not have to pay any rent.

- c* After the deceased passed away she did not go to his place of work to collect any documents. She also informed the Court that the deceased did not keep any records of his business with her in Segamat, Johore.

Before her husband met with the accident he was a healthy man. She did receive regular payments from her husband when he was still alive.

- d* In cross-examination PW3 stated that she did not know whether her husband paid income tax or not. She did not know how many packets of cigarettes her husband smoked a day. She also stated her husband did drink alcohol.

- e* When she was asked whether the husband gambled every day she answered that she was not sure. She was also asked whether he employed a maid to clean his house, she answered yes.

She knew her husband owned a vehicle before he died. She did not know whether it was still under finance or not.

- f* She said her husband sent the monthly money to her through his friends or bank.

She did not have the bank statements to show that her husband sent her money as she threw all the statements.

- g* Chia Geen Hong (PW4) stated in evidence that she worked with Rimyasa from March 1982 till June 1995. She stated as a general clerk then she was promoted to be assistant export section manager. Whenever her colleague was on leave she would act as a cashier. She was involved in the preparation of payment vouchers, that is salary for the employees and contractors wages.

- h* PW4 further stated that the deceased was a sawing contractor for Rimyasa.

P1 A5, P1 A6, P1 A9, P1 A11, P1 A15, P1 A16, P1 A18 were prepared by PW4. She also signed on these payment vouchers made payable to the deceased.

- i* She also stated that P2A to H are memos. The purpose of the memos is to inform the KK Office that they need that much of money for the salary and wages of these persons stated in the memos.

She signed all the memos. She was the only one involved in the preparation of the memos.

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Tan Teak Ang (PW5) has stated in evidence that the deceased is his elder brother. The deceased started work for Rimyasa in April 1980 as a sawing subcontractor. PW5 worked for the deceased to be in-charge of his workers.

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In 1983 and 1984 the deceased was no more with Rimyasa. So PW5 was also no more with Rimyasa.

In 1985 the deceased worked again for Rimyasa as a sawing subcontractor. And PW5 worked for the deceased as the in-charge of his workers.

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PW5 has stated that he was not a partner of the deceased's business. He confirmed that the deceased was a contractor for Rimyasa from 1985 to 1989. And during this period he was the deceased's foreman. He did not share with the deceased the profits from the business.

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After the deceased passed away he worked for Rimyasa as a contractor.

PW5 told the Court that as a contractor himself he collects contract fees of about RM80,000 per month. His nett income from the contract fee is about RM4,000 plus per month.

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The deceased has an average of about 70 to 80 workers.

The deceased stayed at the quarters provided by Rimyasa. The deceased did not have to pay anything to Rimyasa.

PW5 stated that the deceased sometimes had his meals in the canteen and sometimes outside. He had to pay RM230 per month for food in the canteen. PW5 said the deceased did not employ any maid.

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In cross-examination PW5 disagreed that he was a joint partner with the deceased in the subcontract work.

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He stated the deceased went back to Johore about three times a year.

According to Gan Chai Giok (PW3) she is the widow of the deceased and they have two children from the marriage namely Tan Beng Hong (now aged 15 years old) and Tan Ko Lei (now aged 12 years old).

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So the claim under s. 7 of the Act is for loss of dependency and is for the benefit of the widow and the two children.

It is not disputed that at the time of his death the deceased was 41 years old.

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Under s. 7(3)(iv)(d) of the Act the number of years purchase is 55 minus 41 divided by 2 equals 7. This is the multiplier.

- a** Having ascertained the multiplier the Court must now decide what is the amount of loss of dependency.

It is provided under s. 7(3)(iv)(c) as follows:

- b** (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:

- (c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death;

- c** Section 7(3)(iv)(c) has been clearly explained in the case of *Chang Chong Foo v. Shivanathan* [1992] 2 MLJ 473 where his Lordship Harun Hashim SCJ (delivering the judgment of the Supreme Court) at p. 479 and 480 said:

- d** In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted; see *Amar Singh v. Chin Kiew* [1960] MLJ 77. This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s. 7(3)(iv)(c) which came into force on 1 October 1984 and states:

- e** In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall: take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.

- f** It will be seen that the same language is used in both s. 7(3)(iv)(c) and s. 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in ss. 7 and 28A bear the same meaning.

- g** In *Harris v. Empress Motors Ltd.*; *Cole v. Crown Poultry Packers Ltd.* [1983] 3 ALL ER 561, the Court of Appeal held that:

- h** (i) the ingredients that go to make up 'living expenses' are the same whether the deceased was young or old, single or married, or with or without dependents;
- i** (ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation;

(iii) any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings.

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In *White v. London Transport Executive* [1982] 1 ALL ER 410, Webster J said at p. 418:

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... in the cost of maintaining himself I include the cost of his housing, heating, food, clothing, necessary travelling and insurance and things of that kind ...

From the evidence adduced I find as a fact that the deceased was employed as a subcontractor with Rimyasa. I accepted the testimony of PW1, PW2 and PW5 that the deceased received subcontract fees of between RM65,000 to RM95,000 per month. Their testimonies are corroborated by the documentary exhibits tendered. The deceased only had to engage his workers to saw the timber. From the monthly subcontract fees I am of the view that the deceased's profit was about RM3,000 per month. In other words his income was about RM3,000 per month.

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Thus I reject the learned Counsel for the defendants submission that since the deceased's Form J and business statements of accounts were not produced, an adverse inference under s. 114(g) of the Evidence Act 1950 should apply. PW3 has explained that the deceased did not keep his Form J and business statements of accounts in Segamat Johore. After the accident the deceased was transferred to General Hospital in Kuala Lumpur where he passed away about two months later. PW3 would then be in a period of grief and therefore it did not occur to her that she should collect her husband's business records and income tax returns (Form J) from the deceased's living quarters at Keningau. Further the payment vouchers tendered clearly established that the deceased was paid between RM65,000 to RM95,000 per month.

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From the testimony of PW1, the administration and finance manager, it is clear that the deceased was employed as a subcontractor with Rimyasa. PW2 has also stated that the deceased was a sawing contractor with Rimyasa. PW4 has also testified that the deceased was a sawing contractor for Rimyasa. PW5 has categorically denied that he was a partner with the deceased when the deceased was a subcontractor with Rimyasa. PW5 has stated that he was the foreman for the deceased.

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I find as a fact that PW5 was not a partner with the deceased.

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The payment vouchers (P1 A1 to A33) clearly show that the contract fees were paid to the deceased. The fact that some of the cheques were made out in the name of PW5 does not indicate that PW5 was a partner with the deceased as we have the evidence of PW2 and PW4 that the deceased has authorised them to issue the cheques in PW5's name and also for PW5 to collect the cheques on behalf of the deceased.

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- a* I therefore assess the deceased's monthly income at RM3,000.
- The next issue I have to decide is what are the living expenses of the deceased.
- b* My assessment of the living expenses of the deceased per month are as follows:
- (a) For food RM400
- (b) Maid RM200.
- c* PW5 has testified that the deceased did not employ a maid. However PW3 has stated that the deceased did employ a maid. I am of the view that the deceased had to employ a maid to clean his living quarters and also to do the cleaning and washing of the clothings.
- (c) RM1,000 for other expenses such as spending on cigarettes, liquor, petrol and other neccesities.
- d*
- So the living expenses of the deceased is RM1,600 per month.
- PW3 has testified that the deceased used to give her RM1,800 every month for the support of herself and the two children. And her monthly expenses come to RM1,850. She has also stated that when the deceased was working in Keningau, she herself was working in Segamat in a wholesaler factory but she did not tell the Court her monthly income. She also did not provide any bank statement to support her claim that she receives RM1,800 per month from the deceased.
- e*
- f* I am of the view that the deceased did not contribute to her and the two children RM1,800 per month. In my view the deceased contributed less than this amount that was why she had to work to supplement her income.
- Further I have assessed the deceased monthly income at RM3,000. And I have
- g* also assessed the living expenses of the deceased at RM1,600 per month. So the loss of dependency per month is $RM3,000 - RM1,600 = RM1,400$.
- Thus I assess the loss of dependency at RM1,400 per month.
- The total loss of dependency is:
- h*
- $RM1,400 \times 84 \text{ months} = RM117,600$
- I therefore award the plaintiff RM22,000 (as agreed) as special damages with interest at 4% per annum from the date of issue of the writ to the date of judgment and thereafter at 8% per annum till realisation.
- i*

I award the plaintiff RM117,600 as general damages. There shall be no interest for this award. Since the two children are still minors, I apportion two-thirds of this award of RM117,600 to the plaintiff (wife) and the remaining one-third to the two children to be held in trust by the Public Trustee in equal shares until their maturity.

Lastly I award costs to the plaintiff. Costs to be taxed unless otherwise agreed.

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